Bridgeport Hospital *and* Federation of Special Police and Law Enforcement Officers. Case 39-CA-162

November 17, 1982

DECISION AND ORDER

On March 18, 1981, Administrative Law Judge Almira Abbot Stevenson issued the attached Decision in this proceeding. Thereafter, the General Counsel filed exceptions and a supporting brief, and Respondent filed an answering brief.

The Board has considered the record and the attached Decision in light of the exceptions and briefs and has decided to affirm the rulings, findings, and conclusions of the Administrative Law Judge, and to adopt her recommended Order.

The Administrative Law Judge recommended the complaint be dismissed in its entirety. She found no merit to the complaint's allegations that Respondent violated the principles of *Weingarten*[1] by issuing "first and final" disciplinary warnings to employees Eugene Hul, Robin Lashley, and John Klaff for refusing to participate in an alleged investigatory interview without their union representative; that walking out of the interview was, in any event, protected concerted activity for which they could not lawfully be disciplined; and that the reason given for their discipline was a pretext to conceal Respondent's antiunion motivation for disciplining these three union adherents. The General Counsel excepts only to the Administrative Law Judge's failure to find that even if the employees were not entitled to the presence of a union representative under *Weingarten*, they nonetheless engaged in protected concerted activity when they jointly walked out of the meeting after Respondent denied their request for such a representative and proceeded with the meeting. We find no merit to the General Counsel's exceptions.

The essential facts regarding the meeting are not in dispute. Respondent, a nonprofit hospital, employs 34 guards and maintains three shifts. Each shift is headed by a lieutenant responsible to George Bood, captain and chief of security. On July 25, 1979, the Union was certified as the exclusive bargaining representative of a unit of all Respondent's security guards, but at the time of the hearing no collective-bargaining agreement had been reached.

In March 1980,[2] Bood became concerned about increasing acts of vandalism being committed against hospital property, and decided to hold meetings with the guard shifts "to call this to the attention of the personnel, and see if there were ways we could probably find out who was responsible for the acts or get ideas or suggestions as to what step [sic] we could take." Bood testified that there was some suspicion by others that the guards themselves may have been responsible for some of the vandalism and that he wished to alert his staff to the importance of regaining the confidence of hospital personnel who had expressed a lack of trust in them.

On March 5, Bood convened the second-shift guards and read a statement which essentially expressed his above-stated concerns and his hope that employee suspicions regarding involvement of security personnel were invalid, admonished them to take pride in their jobs, and sought their opinions, ideas, or comments on the subject problems. During the ensuing discussion, Bood, who asked no direct question of anyone at the meeting, elaborated on the incidents of vandalism, and assured the guards that no one was accusing anyone and that he was not conducting a disciplinary investigation.

At the instruction of the shift lieutenant, the four night-shift guards assembled in the conference room next to Bood's office at 8 a.m. on March 6.[3] Soon after Bood began reading the statements he had read to the second shift, employee Hul interrupted by asking whether this was the same kind of meeting Bood had held with the second shift. Bood responded that it was. Hul said in that case he wanted his union representative present. Bood replied that it was not a disciplinary interview and there was no need for a union representative. Bood then resumed reading the statement. Hul again interrupted, saying they had been instructed by their union representative to leave if they were not permitted to have a steward present. Bood stated that he felt they should remain and hear what he had to say, but Hul along with employees Lashley and Klaff left the meeting.[4] Following the meeting, none of the security guards was disciplined for vandalism. However, the next day, Bood issued "first and final" disciplinary warnings for insubordination to the three guards who had walked out of the meeting.

[1] *N.L.R.B.* v. *J. Weingarten, Inc.*, 420 U.S. 251 (1975).

[2] All dates herein are in 1980 unless otherwise indicated.

[3] According to credited testimony, it was Bood's standard practice to call shift meetings in this fashion once or twice a month.

[4] It is clear that there was no prearrangement among the three who left the meeting to leave if the request for a representative was denied. Hul had been told by Abe Ferrara, a part-time guard and negotiating committee member, not to attend any disciplinary meetings without his union representative. Lashley and Klaff left because they agreed with Hul. Lashley, who had heard about the second-shift meeting from one of the guards on that shift, had sometime earlier been similarly instructed by Ferrara. Klaff regarded Hul as a firm supporter of the Union and his spokesman on this occasion. All three were paid for the time they spent at the meeting; however, Hul and Klaff returned the money.

Based on the above facts, the Administrative Law Judge found *inter alia*, that the walkout of the three employees was concerted, but unprotected. In this regard, the Administrative Law Judge reasoned that since the employees were not entitled to have their union representative present, it was their duty to remain as requested by their supervisor and hear his discussion of a matter of legitimate concern to Respondent; and that by refusing to do so they gave Respondent grounds for regarding them as insubordinate. The Administrative Law Judge therefore concluded that the Act does not shield Hul, Lashley, and Klaff from the discipline meted out to them. We agree.

In his exceptions, counsel for the General Counsel argues that since the subject matter of the meeting concerned the employees' terms and conditions of employment, their walkout was protected irrespective of their entitlement to the presence of a union representative. Such reasoning, however, wholly ignores the operative fact of this case—that the employees walked out of the meeting solely in protest of Respondent's lawful denial of their demand for a union representative.

The record is devoid of evidence that during their brief stay at the meeting (which they were assured was not a disciplinary investigation) the three employees in question ever addressed the subject matter of the meeting, i.e., vandalism against Respondent's property, let alone the issue of whether they were properly carrying out their duties. The only concerns expressed were stated by Hul, the group's spokesman, and in each instance his remarks were limited to demanding the presence of a union representative. When these demands were not met, and despite Supervisor George Bood's suggestion that they remain and hear what he had to say, Hul, Lashley, and Klaff left the meeting. Clearly, from these facts—which are the sum and substance of what occurred—there is no indication that the three employees walked out in protest of a term and condition of their employment. Thus, there was no mention of work performance by any of the three, or any indication that such was their concern.[5] To the contrary, the employees' sole expressed concern was Respondent's compliance with their demand to have a union representative present. Since, as found, they were not entitled to the presence of such a representative at the meeting, their walkout in furtherance of that demand was unprotected by the Act.

Accordingly, we shall dismiss the complaint.

[5] That the subject matter of vandalism tangentially touches upon a term of employment—employee performance—is insufficient to convert the walkout into a protected concerted activity.

ORDER

Pursuant to Section 10(c) of the National Labor Relations Act, as amended, the National Labor Relations Board adopts as its Order the recommended Order of the Administrative Law Judge and orders that the complaint be, and it hereby is, dismissed in its entirety.

MEMBERS FANNING and JENKINS, dissenting:

We cannot agree with our colleagues' conclusion that employees Hul, Lashley, and Klaff engaged in activity unprotected by the Act when they walked out of an after-hours meeting with Respondent's chief of security, George Bood, in protest of Bood's refusal to allow their union representative to be present. Our colleagues reach this conclusion by reasoning that because Bood's action was lawful, the employees' protest, *per se*, was unprotected.[6] With this analysis, our colleagues have sidestepped the precise issue raised by the General Counsel's exceptions herein; i.e., whether the employees' protest was protected *notwithstanding the fact that the subject of their protest was Respondent's lawful action.*

Any reasoned anylasis of whether a particular employee protest is protected must begin not with the lawfulness of the subject of the protest, nor with the employees' "entitlement" to that which they seek, but rather with Section 7 of the Act which provides, *inter alia*, that "[e]mployees shall have the right . . . to engage in . . . concerted activities for . . . mutual aid or protection . . . ." Since there can be no doubt that the employees' protest herein was concerted, the sole issue to be resolved is whether such protest was for "mutual aid or protection" as that term is used in Section 7 of the Act.[7]

[6] Understandably, our colleagues cite no support for this curious proposition, for the cases are legion where it has been held that employees protesting unwelcomed, *but lawful* actions of their employer are engaged in activity protected by the Act. See, e.g., *W. C. Electrical Co., Inc.*, 262 NLRB 557 (1982) (protest of lawful sick leave policy); *Douglas Aircraft Company, Component of McDonnell Douglas Corporation*, 260 NLRB 1354 (1982) (protest of lawful rules regarding use of vending machines); *S. L. Industries, Inc.*, 252 NLRB 1058 (1980), and *J. P. Hamer Lumber Company, Division of Gamble Brothers, Inc.*, 241 NLRB 613 (1979) (protest of lawful mandatory overtime); *Standard Motor Products, Inc.*, 246 NLRB 331 (1979) (protest of lawful personnel policies); *Silvercrest Industries, Inc.*, 234 NLRB 1182 (1978), and *L. C. Cassidy & Son, Inc.*, 206 NLRB 486 (1973) (protest of lawful method of calculating pay); and *GAC Properties, Inc.*, 205 NLRB 1150 (1973) (protest of lawful policy regarding hours of work). Indeed, our colleagues' analysis herein seriously undermines the protection traditionally accorded economic strikers who, by definition, are protesting their employer's *lawful* refusal to accede to their bargaining demands.

[7] Although employees may lose the protection of the Act because of the *manner* in which they choose to act for "mutual aid or protection," this issue is not presented herein; in finding the employees' protest herein unprotected, our colleagues rely upon the *subject* of the protest, *not* the manner in which it was carried out.

Although it is true that not all employee activity falls within the term "mutual aid or protection," that term is sufficiently broad to encompass a spectrum of activities ranging from simple protests of particular working conditions to the utilization of administrative and judicial forums and appeals to legislative bodies.[8] The common thread which runs throughout all activities falling within this spectrum is that each activity bears some relationship to "employees' interests as employees."[9] Thus, the question herein is whether the employees' protest bears any relationship to their "interests as employees"; this question, in turn, can be answered by evaluating the subject of the employees' protest.

As our colleagues have observed, employees Hul, Lashley, and Klaff walked out of the meeting in question in protest of Respondent's refusal to allow their union representative to be present; however, a more complete statement of the *subject* of the protest is that they were protesting Respondent's *holding of the meeting* without acceding to their request that their union representative be allowed to attend. Clearly, the circumstances under which employees can be required to attend an after-hours meeting bears *some* relationship to their "interests as employees"; moreover, it would seem to make little difference that the dispute was over the identity of the invitees rather than the time or place of the meeting. This is particularly true when the purpose of the meeting is to criticize the employees' job performance, question their professional integrity, and imply that they had committed the very acts of vandalism which it was their duty to prevent.

In short, we are not willing to conclude that the employees' protest herein was unrelated to their "interests as employees"; apparently, our colleagues are prepared to do so. Accordingly, we dissent.

[8] *Eastex Inc.* v. *N.L.R.B.*, 437 U.S. 556 (1978).
[9] *Id.* at 566, 567.

DECISION

STATEMENT OF THE CASE

ALMIRA ABBOT STEVENSON, Administrative Law Judge: This case was heard in Hartford, Connecticut, November 5, 1980. The charge was served on the Respondent March 19, 1980. The complaint was issued May 22, 1980, and was duly answered by the Respondent.

The issue is whether or not the Respondent violated Section 8(a)(1) and (3) of the National Labor Relations Act, as amended, by issuing warning notices to three employees because they walked out of a meeting called by their supervisor after the supervisor denied the request of one of the employees for a union representative to be present.[1] For the reasons given below I conclude that the complaint must be dismissed.

Upon the entire record, my observation of the demeanor of the witnesses, and after consideration of the briefs filed by the General Counsel and the Respondent, I make the following:

FINDINGS OF FACT AND CONCLUSIONS OF LAW

Facts

The Respondent is a nonprofit hospital located in Bridgeport, Connecticut. It employs 34 guards who work in 3 shifts, each headed by a lieutenant responsible to George Bood, captain and chief of security, whom I find is a supervisor and agent of the Respondent.

As indicated, the Union was certified on July 25, 1979, as the exclusive bargaining representative of an appropriate unit of all the Respondent's security guards. Although a number of negotiating sessions have been held and the guards conducted a short strike, no collective-bargaining agreement has been reached.

In March 1980, Bood became concerned about increasing acts of vandalism being committed against hospital property, and decided to hold meetings with the guard shifts "to call this to the attention of the personnel, and see if there were ways we could probably find out who was causing the acts or get ideas or suggestions as to what steps we could take." Bood testified that there was some suspicion that the guards themselves may have been responsible for some of the vandalism because it occurred in areas to which only the security forces had access; and he wished to alert his staff to the importance of regaining the confidence of hospital personnel who had expressed a lack of trust in them.[2]

Bood convened the second-shift guards on March 5 and read them the following statement:

> There are a number of incidents that have been happening, they might even be termed, harassing incidents, why and by who is a question. I have made a list but I am sure you are unaware of *some* if not *most* of them. Some of the incidents include Security Dept. equipment. I feel it necessary to discuss this problem for several reasons.
>
> A number of hospital personnel have expressed their views reflecting suspicion on Security Department personnel. Why? The simple fact that due to past circumstances, the Security Department has lost the trust of many of the hospital personnel.

[1] No issue is raised with regard to jurisdiction. Based on the allegations of the complaint and the admissions of the answer, I find that the Respondent is an employer engaged in commerce within the meaning of Sec. 2(2), (6), and (7) of the Act and a health care institution within the meaning of Sec. 2(14) of the Act. Based on a stipulation of the parties that the Charging Party Union was certified by the National Labor Relations Board in Case 2-RC-18380 as the exclusive bargaining representative of all security guards employed by the Respondent, on July 25, 1979, I find that the Union is a labor organization within the meaning of Sec. 2(5) of the Act.

[2] Bood described the vandalism as watchmen's key stations being pulled from the wall or their chains cut; the tape in one portable watchclock being destroyed by pouring water in it; and another watchclock being found hidden in the guard locker room.

I had hoped we could regain this trust over a period of time, and for a while, I felt we were succeeding, until the start of these incidents.

I've defended the personnel of the Security Department.

The recent happenings, though, throw much suspicion on Security Personnel. In particular, damage to Security Department equipment which is used *only* by Security personnel.

What are my feelings now? Truthfully, I am beginning to wonder, are there a few Security personnel, who for some reason, feel that these harassing incidents may solve some problem?

If Security personnel are involved, they are *only* hurting themselves as well as their fellow workers and MORE, the Security Departments ability to function, to provide security for Bpt. Hospital.

I honestly hope these suspicions are not true. Only *YOU* can prove that all suspicions are unwarranted by doing all you can to reveal those who are responsible.

You must all be *more* conscious and alert to all that is happening around you when on post or patrol duty.

If you have any feelings of respect for YOURSELF then you must consider that the position of a Security Officer is one you should take pride in. It is an extremely responsible position of TRUST. Trust by hospital Administrators that the Security Personnel are diplomatic ambassadors who will provide efficient Security for the facility, personnel, patients and visitors. Trust by hospital personnel, visitors and patients, that Security will provide numerous forms of assistance.

I felt we had quality personnel to perform our Security functions, but, do we?

I take pride in my job, do you?

Do any of you have any opinions, ideas or suggestions as to who may be responsible for these incidents or what can be done to control or prevent them.

When his statement was finished, Bood asked for discussion. Some guards questioned him about the specific vandalism he had in mind and he told them. One guard said he felt that the hospital employees who expressed distrust of security were accusing them and that they had a right to be confronted by their accusers. Bood responded that no one had accused anyone, and he assured the guards he was not conducting a disciplinary investigation. He asked no direct questions of any individual at the meeting.

And now we come to the meeting with the night shift, at which the critical incidents occurred.

Bood summoned the night shift in accord with his standard practice in calling shift meetings once or twice a month whenever he had information to discuss with them[3] by leaving instructions with the shift lieutenant to ask his guards to assemble in the conference room next to Bood's office at the end of the shift, 8 a.m. on Thursday, March 6. The entire shift complement of four guards and the lieutenant appeared at the appointed time.

Bood began to read the same statement he had read to the second shift, but, before he got very far, Officer Eugen Hul interrupted by asking whether this was the same kind of meeting he had held with he second shift. Bood responded that it was. Hul said in that case he wanted his union representative present. Bood replied it was not a disciplinary interview and there was no need for the presence of a union representative, and he began again to read the statement, Hul interrupted again and said they had been instructed by their union steward to leave the meeting if they were not allowed to have the steward present. Bood stated he felt they should remain and hear what he had to say, but Hul, Lashley, and Klaff left the meeting.[4]

The next day Bood issued "first and final" disciplinary warnings to the three guards for insubordination: disobedience of a proper and lawful direction from their supervisor, meaning, Bood explained, walking out of an informative meeting scheduled by supervision.

Hul's request for his union representative was intended, and understood by all, to refer to a part-time guard, Abe Ferrara. Ferrara was a member of the five-employee negotiating committee who had come to the hospital a few times on weekdays to act as an employee representative, but who worked only Saturdays and Sundays, and, as known to all, was not on the premises at 8.a.m., Thursday, March 6.

The record shows there was no prearrangement among the three who left the meeting. Hul was not a member of the negotiating committee but had attended several sessions. Hul testified that his conduct at the meeting was based on instructions received by telephone from Ferrara after Hul discussed the previous meeting with most of the second-shift guards. Lashley and Klaff testified they left because they agreed with Hul, Lashley having been instructed by Ferrara when he took the job in August 1979 not to attend any disciplinary meetings without his union representative present and having heard about the second-shift meeting from one of the guards on that shift, and Klaff regarding Hul as a firm supporter of the Union and his spokesman on this occasion.

Hul, Lashley, and Klaff were paid for the time spent at the meeting, but Hul and Klaff turned the money back. None of the security guards has been disciplined for vandalism.

Contentions and Conclusions

The General Counsel contends that the Respondent (a) violated the *Weingarten*[5] rule by disciplining these three

[3] Based on the credited testimony of Bood and Officer John Klaff. I do not credit Officers Eugen Hul and Rubin Lashley that this was the first meeting ever called by Bood with the night shift.

[4] Based on an amalgamation of the testimony of all witnesses as to what occurred at the meeting, their accounts varying in only minor respects.

[5] *N.L.R.B.* v. *J. Weingarten, Inc.*, 420 U.S. 251 (1975).

employees for refusing to participate in an investigatory interview without their union representative; (b) that the walkout of the three employees was, in any event, protected concerted activity for which they could not lawfully be disciplined; and (c) that the reason given for the discipline was a pretext to conceal the Respondent's real motive to discriminate against three adherents of the Union.

As to (a) I find that this case does not contain one of the essential ingredients spelled out by the Supreme Court for triggering the *Weingarten* rule, that:

> [T]he employee's right to request representation as a condition for participation in an interview is limited to situations where the employee reasonably believes the investigation will result in disciplinary action.

Thus it is undisputed that it is Bood's practice to conduct disciplinary interviews in his office and not in the conference room where the night shift was assembled. Moreover, Bood credibly testified that he did not contemplate taking disciplinary action against any of the guards as a result of these meetings. And the evidence is clear that Bood so informed the group, and that no disciplinary action has been taken against any security guard for vandalism as a result of these meetings or otherwise. In these circumstances, and in view of the rhetorical nature of the questions posed in Bood's statement, and the fact that he singled out no individual for questioning about responsibility for the vandalism, assuring them that no one was accusing anyone, I find that Hul, Lashley, and Klaff did not have reasonable grounds to believe that participation in the night-shift meeting would result in disciplinary action against them.[6]

Accordingly, I conclude that the *Weingarten, supra*, allegation has not been sustained, and recommend that it be dismissed.[7]

As to (b) it is conceded that, although not planned in advance, the walkout by the three employees was concerted. However, I cannot agree with the General Counsel that the walkout over the refusal of their demand for their union representative[8] was protected because it occurred on the employees' own time and did not cause a disturbance or disruption of the Respondent's operations. Whether or not the conduct occurred during regular shift hours is irrelevant,[9] and the subsequent return by two of them of the money paid for time attending the meeting did not change their employment status. Similarly irrelevant to the issue posed is the peaceful nature of the employees conduct. That issue is, does the Act protect the refusal of a group of employees to remain at the meeting because their supervisor would not grant their demand for the presence of their union representative? The answer is, it does not. As the employees were not entitled to have their union representative present, it was their duty to remain as requested by their supervisor and hear his discussion of a matter of legitimate concern to their Employer. By refusing to do so, the employees gave the Respondent grounds for regarding them as insubordinate and the Act does not shield them from the consequences.[10]

As to (c) the General Counsel's discriminatory motivation contention appears to be based on a statement in the Respondent's answer to the complaint describing the three named employees as union adherents. There is, however, no evidence of union animus or disparate treatment; moreover, the timing of the warning notice followed immediately after the three walked out of the meeting and I cannot find that the reasons advanced in the warnings were not descriptive of that conduct. Accordingly, I find that a preponderance of the evidence fails to support this allegation, and I conclude that it should be dismissed.

Summarizing, I find that Hul, Lashley, and Klaff were given first and final warning notices because of their insubordination in walking out over their supervisor's protest, and, for a reason unprotected by the Act, of a legitimate meeting of employees called by their Employer for business purposes. I conclude that the complaint must be dismissed entirely.

Upon the foregoing findings of fact, conclusions of law, and the entire record, I hereby issue the following recommended:

ORDER[11]

The complaint is dismissed in its entirety.

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[6] *Stewart-Warner Corporation*, 253 NLRB 136 (1980); *General Electric Company*, 240 NLRB 479 (1979); *Amoco Chemical Corporation*, 237 NLRB 394 (1978). See also *Spartan Stores, Inc.* v. *N.L.R.B.*, 628 F.2d 953 (6th Cir. 1980), and *AAA Equipment Service Company* v. *N.L.R.B.*, 598 F.2d 1142, 1146 (8th Cir. 1979). Evidence of the subject motivations of the three employees has not been considered. See *N.L.R.B.* v. *J. Weingarten, Inc., supra*, fn. 5.

[7] I find it unnecessary to deal with additional grounds advanced by the Respondent for dismissing this allegation—that this case does not involve "a lone employee" subjected to an interview by his employer, as referred to by the Supreme Court (*N.L.R.B.* v. *J. Weingarten, Inc., supra*, 260 and 263), and the Board (*Good Samaritan Nursing Home, Inc.*, 250 NLRB 207 (1980), but the entire night shift; and that the Respondent was not required to postpone the meeting in view of the fact that Abe Ferrara, the union representative requested, was not available whereas Hul, who himself had attended several negotiating meetings, was regarded as a firm union supporter and as their spokesman by the two other employees who walked out, was available to act as a representative of all (see *Roadway Express, Inc.*, 246 NLRB 1127 (1979); *Crown Zellerbach Inc., Flexible Packaging Division*, 239 NLRB 1124, 1127 (1978); and *Coca Cola Bottling Co. of Los Angeles*, 227 NLRB 1276 (1977).

[8] There is no contention that this was a strike in protest against the Respondent's investigation of the vandalism. Cf. *Woonsocket Health Centre*, 245 NLRB 652 (1979).

[9] See *Chevron Chemical Company*, 191 NLRB 292 (1971).

[10] See *Southwest Detroit Hospital*, 249 NLRB 449 (1980); *Bechtel Incorporated*, 248 NLRB 1222 (1980); *Addessograph-Multigraph Corporation*, 228 NLRB 6 (1977); *Chevron Chemical Company, supra; Riviera Manufacturing Co.*, 167 NLRB 772 (1967); *J. P. Stevens Co.* v. *N.L.R.B.*, 547 F.2d 792 (4th Cir. 1976), *Prescott Industrial Products Co.*, 205 NLRB 51 (1973); and *Polytech, Inc.*, 195 NLRB 695 (1972), relied on by the General Counsel, are distinguishable on their facts.

[11] In the event no exceptions are filed as provided by Sec. 102.46 of the Rules and Regulations of the National Labor Relations Board, the findings, conclusions, and recommended Order herein shall, as provided in Sec. 102.48 of the Rules and Regulations, be adopted by the Board and become its findings, conclusions, and Order, and all objections thereto shall be deemed waived for all purposes.